82-957

No. 82-

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

DOUBLEDAY SPORTS, INC.,

Petitioner,

v.

EASTERN MICROWAVE, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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Dated: December 8, 1982

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QUESTION PRESENTED FOR REVIEW[1]

1. Whether the Court of Appeals misconstrued the plain language and ignored the legislative history of the Copyright Revision Act of 1976 by freeing from liability any commercial enterprise that retransmits, and hence performs to the public, over-the-air broadcasts of copyrighted works without authorization of the copyright holder, even though the retransmitter chooses and actively markets the signal retransmitted based on its substantive content and thereby exploits the commercial value of the copyright holder's property.

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[1] Doubleday & Company, Inc., is the parent corporation of petitioner Doubleday Sports, Inc.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is not yet reported. It is reproduced at App. 1a-18a. The decision of the United States District Court for the Northern District of New York, 534 F. Supp. 533 (N.D.N.Y. 1982), is reproduced at App. 19a-30a.

JURISDICTION

This case arises under the Copyright Revision Act of 1976, 17 U.S.C. §§ 101 *et seq.* Federal jurisdiction is founded upon 28 U.S.C. §1338. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1254(1) and 2101(c) to review the decision of the court of appeals rendered October 13, 1982.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Copyright Revision Act, 17 U.S.C. §§ 101 *et seq.*, are set forth at App. 38a-47a.

STATEMENT OF THE CASE

This case involves the first judicial interpretation of a key provision of the Copyright Revision Act of 1976 (the "Act") to reach this Court. The court of appeals interpreted Section 111(a)(3) of the Act in a way that expands a statutory exemption from liability for copyright infringement beyond the limits imposed by Congress and thereby erodes the copyright interests that the Act was intended to protect. As a result, copyright holders across the nation face substantial losses arising from the unauthorized exploitation of their copyrighted works.

In the Copyright Revision Act, Congress reaffirmed and strengthened the exclusive right of the copyright holder to the commercial exploitation of his copyrighted works. Act, § 106(4). In so doing, Congress overruled two decisions of this Court—*Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968), and *Teleprompter Corp.* v. *CBS, Inc.*, 415 U.S. 394 (1974)—in order to impose copyright liability on cable television systems for their retransmissions of distant television signals. The Act also granted cable systems a compulsory license for such retransmissions, requiring them to pay a royalty to copyright holders as set by statute. Other retransmitters were left subject to full copyright liability, with a few narrow exceptions.

One of those exceptions is contained in Section 111(a)(3) of the Act, 17 U.S.C. § 111(a)(3). That section provides that retransmissions of copyrighted broadcasts are exempt from copyright liability so long as the retransmitting enterprise selects neither the initial broadcast nor its recipients, and merely

provides channels of communication for others (App. 39a).[1] The legislative history of Section 111(a)(3) shows that it was sponsored by, and adopted at the behest of, the American Telephone and Telegraph Company—a "passive" carrier that retransmits signals solely at the direction of its customers.

Despite the plain language of Section 111(a)(3) and its unambiguous legislative history, the court of appeals broadened the statutory exemption to embrace any retransmission activity, so long as the retransmitter does not physically alter or edit the signal retransmitted. That decision is plainly incorrect. Congress enacted an exemption intended to shelter only those entities that provide retransmission facilities for the carriage of signals selected by their customers. The court below has immunized from copyright liability entities, like the respondent here, that select the signals themselves and profit by selling those signals (together with their copyrighted works) to the public.

Eastern Microwave

Respondent Eastern Microwave, Inc. ("EMI") is a so-called "resaler" that appropriates the signals of conventional television stations and retransmits them for a fee to nearly 1300 cable television systems having approximately 5,000,000 individual subscribers across the country. Unless EMI qualifies for the Section 111(a)(3) exemption, it is subject to copyright liability.

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[1] Section 111(a)(3) provides pertinently:

"(a) CERTAIN SECONDARY TRANSMISSIONS EXEMPTED.—The secondary transmission of a primary transmission embodying a performance or display of a work is not an infringement of copyright if—

* * *

"(3) the secondary transmission is made by any carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others . . . ."

Among the signals selected by EMI for retransmission is that of WOR-TV, a New York City television station. WOR-TV carries games of the New York Mets, to which petitioner Doubleday Sports, Inc. ("Doubleday Sports") owns the copyright.

EMI retransmits its signals both by overland microwave relay facilities and by an orbiting earth satellite. EMI's microwave retransmissions are confined to the northeastern United States and include the signals of 15 conventional broadcast stations in addition to WOR-TV. By contrast, EMI's satellite retransmissions, which began in April 1979, cover the entire country. Because of the limited number of transponders available for lease on the orbiting satellite (which is owned by an affiliate of RCA), EMI has retransmitted only the signal of WOR-TV.

EMI selected WOR-TV as its one station for satellite retransmission, based on the substantive content of WOR's programming, including prominently its broadcasts of Mets baseball games. Thereafter, EMI conducted a so-called marketing "survey" that offered EMI's customers no choice among various signals, but consisted instead of an elaborate marketing effort for the WOR-TV signal. In contrast to the cable systems contacted by EMI during its "survey"—and EMI contacted every system in the country having more than 5000 subscribers—only one or two made unsolicited requests for the retransmission of WOR-TV. Subsequent to its initial marketing effort, EMI mounted an extensive advertising and promotional campaign to sell the WOR-TV retransmission to additional cable customers.[2]

As noted, the conventional television stations whose signals are appropriated by EMI are subject to copyright liability; they must negotiate licenses with copyright holders in order to broadcast their works. The cable television systems to which EMI retransmits have a compulsory license; they pay statutorily prescribed royalties for their licenses to the Copyright Royalty

[2] Samples of EMI's promotional activities are set forth in the Appendix (App. 48a-55a).

Tribunal, which eventually distributes the proceeds to copyright holders. Act, § 111(d)(3).

However, EMI has no license of any kind: it has no agreement with Doubleday Sports to exploit telecasts of Mets games, and because it is not a cable system it has no compulsory license under the 1976 law. Prior to this litigation, EMI never compensated Doubleday Sports or any other copyright holder for its use of their copyrighted works. In essence, EMI receives a free ride at the expense of those who devote their talents and efforts to the production and exhibition of copyrighted programs.

Doubleday Sports

Doubleday Sports has owned and operated the New York Mets baseball team since February 1980. As the owner of the Mets, Doubleday Sports holds the copyright interest in telecasts of the team's baseball games. Like other copyright holders, Doubleday Sports has licensed its interest to various broadcasters. It has contracted with WOR-TV, the Mets' "flagship station," to telecast numerous games during each regular baseball season; it has licensed certain cable broadcasts of Mets games in the New York City metropolitan area; and, through the Commissioner of Baseball, it has granted exclusive rights in specified games to two national television networks and a national cable network.

By their nature and particularly by virtue of their nationwide sweep, EMI's retransmissions of Mets games to its 1300 cable customers and their millions of subscribers across the country interfere with Doubleday Sports' existing contracts. EMI's retransmissions necessarily undermine Doubleday Sports' ability to negotiate licenses for future broadcasts of Mets games, including particularly cablecasts arranged by agreement between the carrying system on the one hand and Doubleday Sports or professional Baseball on the other.

Proceedings Below

In March 1981, Doubleday Sports notified EMI that its unauthorized retransmissions of Mets games infringe Double-

day Sports' copyright. Thereupon, EMI instituted suit in the United States District Court for the Northern District of New York, seeking a declaratory judgment that it is a "passive" carrier, exempt from copyright liability under Section 111(a)(3) of the Copyright Revision Act.[3] EMI later amended its complaint to assert additionally that its retransmissions are not "public performances" within Sections 101 and 106 of the Act, and therefore do not infringe Doubleday Sports' copyright.

The district court (McCurn, J.) rejected both of EMI's contentions, and granted Doubleday Sports' motion for summary judgment dismissing EMI's complaint. With respect to Section 111(a)(3), the district court found the record "clear that EMI selected the primary transmission" of WOR-TV (App. 28a). The district court further concluded that EMI also had selected the recipients of its retransmissions and that its promotion of the WOR-TV signal extended well beyond the mere provision of channels of communication for others (App. 28a-30).

The court of appeals (per Markey, J., C.C.P.A., sitting by designation) reversed, without reaching the "public performance" issue. The Court acknowledged that EMI had selected the WOR-TV signal to the exclusion of all others that it might have transmitted via satellite, but concluded that the only type of "selection" proscribed by Section 111(a)(3) involves the physical alteration or editing of the signal itself (App. 11a-12a). The court also concluded that EMI had not chosen the recipients of its transmissions, and that its marketing of the WOR-TV signal had not exceeded the mere provision of channels of communication for others.

In so ruling, the court of appeals assumed—incorrectly—that it was addressing issues never considered by Congress (App. 5a). The court's decision therefore was predicated not on the specific statutory language or its accompanying legislative history, but on what the court erroneously surmised to be the broad policy objectives of the Copyright Act.

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[3] Jurisdiction in the district court was founded on 28 U.S.C. § 1338.

REASONS FOR GRANTING THE WRIT

In the Copyright Revision Act of 1976, Congress overruled prior decisions by this Court that had immunized cable systems from copyright liability, and adopted a comprehensive scheme of protection for copyrighted works. The few exemptions carved out from the revised statutory scheme were limited to narrowly defined circumstances. Section 111(a)(3) embodies one such exemption. The Section applies only to retransmitting entities, like the telephone company, that are passive in relation to the signals they retransmit—that do no more than retransmit what their customers direct.

The court of appeals expanded this exemption from copyright liability to cover an entrepreneurial "resaler" that has picked a single broadcast signal, based on its substantive programming content, and marketed that signal at a profit for retransmission to others. The court adopted a construction of Section 111(a)(3) in conflict with the plain language and legislative history of the provision. It misread the policies underlying the Act. And it relied on unfounded assumptions that are inconsistent with the findings of the appropriate government agencies.

The consequences of the decision below are far-reaching. The court of appeals' ruling deprives thousands of copyright holders of control over their copyrighted works, in contravention of the basic premise of the Act, whenever the signals of conventional broadcasting stations are picked up for retransmission. The value of copyrights subjected over the holder's objection to such widespread, even nationwide dissemination will deteriorate to insignificance.

I. THE COURT OF APPEALS DISREGARDED THE PLAIN LANGUAGE AND LEGISLATIVE HISTORY OF THE COPYRIGHT REVISION ACT

1. This Court has held repeatedly that "the meaning of a statute must, in the first instance, be sought in the language in which the act is framed." *Caminetti* v. *United States,* 242 U.S.

470, 485 (1917).[4] The court of appeals did not merely skip that step; it overrode the plain language of the Copyright Act.

The central issue before the court of appeals was whether EMI, in the words of Section 111(a)(3), exercises "direct or indirect control over . . . the selection of the primary transmission." WOR-TV's signal unquestionably is a "primary transmission,"[5] and the court conceded that EMI's choice of the WOR-TV signal is a "type of 'selection'" (App. 11a). The district court, in a conclusion left undisturbed by the court of appeals, held that EMI's performances are to "the public" within the meaning of the Act (App. 22a-26a), and the court of appeals intimated strongly that it agreed with that ruling (App. 14a-15a n.16).

Nonetheless, the court of appeals concluded that EMI's selection of WOR-TV is not the type "intended to be precluded under Section 111(a)(3)" (App. 11a). That impermissible type of selection would occur, according to the court of appeals, only if EMI physically alters or edits the signal retransmitted.[6]

The error of the court below begins with its violation of the "fundamental canon of statutory construction . . . that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin* v. *United States*, 444 U.S. 37, 42 (1979). In common parlance, the term "select" does not mean to "alter" or to "edit"; it means to "choose." EMI indisputably chooses the signal of WOR-TV,

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[4] *Accord: TVA* v. *Hill*, 437 U.S. 153, 173, 184 n.29 (1978); *Southeastern Community College* v. *Davis*, 442 U.S. 397, 405 (1979); *Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 201 (1976).

[5] Section 111(f) defines "primary transmission" as

> "a transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service, regardless of where or when the performance or display was first transmitted."

[6] For its overland microwave transmissions, EMI retransmits the excerpted signal of WCBS-TV to supplement the signals of stations that do not broadcast 24 hours a day. The court of appeals did not explain why, even under its own standard, that activity does not disqualify EMI from the Section 111(a)(3) exemption.

over all others, for retransmission by satellite. It does so on the basis of the marketability of that signal as determined by its programming content.[7]

When Congress intended to prohibit the alteration or editing of the primary transmitter's signal, it said so. In Section 111(c)(3) of the Act, using language that bears no resemblance to Section 111(a)(3), Congress proscribed such alterations by cable systems.[8]

2. The court of appeals also disregarded the legislative history of the Copyright Act. The legislative record shows that Section 111(a)(3) evolved as a congressional response to a request by the telephone company that its passive carrier services be insulated from copyright liability.[9] The court overlooked that in drafting Section 111(a)(3), Congress rejected the concept that "selection" should be limited to the alteration or editing of the signal transmitted. In clarifying what entities would qualify as "passive" carriers entitled to invoke the Section 111(a)(3) exemption, the Senate Judiciary Committee stated:

> "Since cable television *necessarily selects* the primary transmissions which are transmitted, and controls the recipients of the secondary transmission, the ex-

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[7] It is equally clear that in selecting and aggressively promoting the WOR-TV signal, EMI engages in activities that do not "consist solely of providing wires, cables, or communications channels for the use of others." Act, § 111(a)(3). Even if EMI's promotional efforts are "normal business activities," as the court of appeals thought (App. 13a n.15), that fact would not remove those efforts from the statutory proscription.

[8] Section 111(c)(3) provides pertinently:

> "[T]he secondary transmission to the public by a cable system of a primary transmission made by a broadcast station ... and embodying a performance or display of a work is actionable as an act of infringement ... if the content of the particular program in which the performance or display is embodied ... *is in any way willfully altered by the cable system through changes, deletions, or additions.*" (Emphasis supplied.)

[9] Letter of Walter J. Derenberg to Herbert Fuchs, Counsel, Subcomm. No. 3, House Judiciary Comm., dated January 27, 1966 (reproduced at App. 56a-64a); H.R. 4347, § 111(a)(1)(C), 89th Cong., 2d Sess. (1966); H.R. Rep. No. 2237 accompanying H.R. 4347, 89th Cong., 2d Sess. 35 (1966).

> emption of this subclause would in no case apply to them." S. Rep. No. 983, 93d Cong., 2d Sess. 131 (1974) (emphasis supplied). *Accord:* H.R. Rep. No. 83, 90th Cong., 1st Sess. 53 (1967).

The only "selection" undertaken by most cable systems is the choice of the conventional television signals they retransmit. That activity, without more, suffices to disqualify cable systems from claiming an exemption from copyright liability. EMI should be disqualified on the same basis. Otherwise, cable systems will "select" the WOR-TV signal when they choose EMI's retransmission of it, but EMI's choice of that same signal to retransmit to the cable systems will not constitute a "selection." Congress plainly did not intend such an anomalous result.

3. Disregarding both Congress' careful choice of language and the clear legislative record, the court of appeals concluded that Congress could not have meant what it plainly said in Section 111(a)(3). In the court's view, if "station selection" sufficed to disqualify EMI from the exemption provided by the Section, the exemption "would be denied to any carrier that did not retransmit every television broadcast of every television station in the country" (App. 11a). That is not correct. RCA, for example, does not relay every television signal in the country by satellite, but nonetheless it is entitled to the statutory exemption because it is merely making its transmission facilities available to its customers—including EMI—without regard to the substantive content of the signals retransmitted. RCA, like the telephone company, is a true common carrier that Congress intended to exempt from copyright liability. The telephone company and similar entities fit the description of "passive" carriers because they exercise no control over, and have no interest in, the selection of the material they retransmit.

By contrast, the record here is undisputed that EMI first selected the WOR-TV signal for satellite retransmission on the basis of the signal's substantive content and then marketed the signal on that basis to its potential cable customers. As the district court aptly put it, the telephone company "markets its services; EMI markets a product"—the WOR-TV signal (App.

30a). To hold that EMI's selectional activity, based on the signal's substantive programming content, falls outside the exemption of Section 111(a)(3) would not undermine the right of passive carriers to invoke that provision.

II. THE COURT OF APPEALS' DECISION SUBVERTS THE POLICIES UNDERLYING THE COPYRIGHT REVISION ACT

The court of appeals supposed that the task before it was to deal with a situation not anticipated by Congress, to fill a gap in "statutes enacted before adoption of the involved communications arrangements" at issue (App. 5a). But there is no gap in the statutory scheme. Contrary to the court's supposition that "the so-called 'resale carriers' are somewhat new in the common carrier world" (App. 12a), resalers such as EMI were retransmitting the signals of conventional television stations via overland microwave relay during the entire period that copyright revision was under legislative consideration. EMI was retransmitting the WOR-TV signal as early as 1965 (App. 3a).[10] Congress undoubtedly knew of such retransmissions. Nonetheless, the statute and its legislative history reveal not the slightest indication that Congress intended to grant such retransmitters a blanket immunity from copyright liability.

The advent of satellite technology did not alter the function performed by resalers. It merely afforded them access to a nationwide rather than a regional market. The technological innovation thus amplified existing encroachments on the interests of copyright holders, encroachments that Congress had not exempted from copyright liability. The advance of technology cannot obscure the critical fact that Congress considered and dealt with the problem of intermediate retransmitters—and exempted only passive carriers.

1. The court of appeals discerned, and fixed as its guidepost, an overriding "public interest . . . in a continuing supply of varied programming to viewers" (App. 16a). The court thereby put conveniently to one side the basic objective of the

[10] As noted, Doubleday Sports did not acquire the Mets until 1980.

copyright system—to afford the copyright owner a reasonable measure of control over the commercial exploitation of his work in its exhibition for profit to the public.[11] That objective surely is frustrated by permitting resalers to appropriate the off-the-air broadcasts of copyrighted material without compensation to the copyright holders and over their objection.

Even if the court of appeals had correctly assessed the congressional objective, a holding that EMI is liable for infringement would not interfere with the continued supply of programming to cable viewers. The court below *assumed* that to apply Section 111(a)(3) as it is written would impose on resalers "unworkable" separate negotiations with copyright holders (App. 15a). But no evidence in the record supports that assumption, and it is hardly a proper subject for judicial notice.

In arriving at its conclusion, the court effectively substituted its judgment for that of the Register of Copyrights and the National Telecommunications and Information Administration. Both agencies previously have found that the participants in the market, particularly satellite resalers like EMI, can protect their interests by negotiating rights in the open market.[12] In addition, because WOR-TV routinely negotiates licenses with the copyright holders of the programming it transmits, there is no apparent reason that EMI, working in concert with WOR-TV, could not do so as well. In any event, the commercial interests

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[11] As this Court recognized in *Goldstein* v. *California*, 412 U.S. 546, 555 (1973):

> "An author who possesses an unlimited copyright may preclude others from copying his creation for commercial purposes without permission. In other words, to encourage people to devote themselves to intellectual and artistic creation, Congress may guarantee to authors and inventors a reward in the form of control over the sale or commercial use of copies of their works."

[12] Statement of Barbara Ringer, Register of Copyrights, Hearings Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Comm. on the Judiciary, 96th Cong., 1st Sess. 23 (1979); Testimony of David Ladd, Register of Copyrights, Hearings on the Copyright Act of 1976 Before the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. (1981); U.S. Dept. of Commerce, National Telecommunications and Information Admin., *Cable Copyright: Alternatives to the Compulsory License*, 73, 137 (Dec. 1981).

of EMI and its customers can be preserved without intervention by the courts to insulate them from copyright liability.

2. Far from furthering the objectives of the Copyright Act, the court of appeals' decision has upset the careful balance struck by Congress between the interests of copyright owners and those of the cable television industry. As noted, under the 1976 Act cable systems are required to pay a royalty for each transmission of copyrighted works. In return, the cable systems hold a compulsory license, subject to a number of statutory limits.

As of 1976, there were technological limits as well. As noted, the regional overland microwave system was well established, and Congress plainly was aware of its existence. But no *nationwide* system for retransmitting copyrighted works to cable stations existed, and Congress did not anticipate the introduction of nationwide satellite networks.[13] Thus, it was thought at the time that, particularly in view of the narrow scope of Section 111(a)(3), the Copyright Revision Act would preserve the central element of copyright owners' interest— a substantial measure of control over the dissemination of protected material.

The decision below threatens to nullify that central element of control. Once a copyright owner licenses his work to *any* local television station, resalers like EMI can expropriate the station's signal and so saturate the nationwide market with the copyrighted work that negotiation of other licenses will become impossible. The copyright owner's only alternative will be to withhold his work from the conventional television broadcast market. The copyright owners' loss of ability to

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[13] Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice, *supra*, n.12, at 23:

> "In enacting section 111(a)(3), Congress certainly did not consider the then unanticipated activities of superstations and satellite relay services when it exempted traditional common carriers from copyright liability" (remarks of Register of Copyrights).

See also Hearings Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce, 96th Cong., 1st Sess., Vol. IV 700 (1979).

control the exploitation of their copyrighted works will be substantial, and the "public interest" in a continuing supply of creative programming on free television will be undermined.

3. Finally, the court of appeals justified its decision on the ground that imposing copyright liability on intermediate retransmitters "would produce a result never intended by Congress, namely a substantially increased royalty payment to copyright owners with no increase in the number of viewers" (App. 17a). The court did not indicate where it found a supposed congressional policy that copyright holders should be compensated only once for the public exploitation of their works, even if more than one infringer profits from that exploitation. Even a cursory reading of the Act and its legislative history reveals the contrary, most particularly in the provision permitting copyright holders to recover *both* damages and infringers' profits. Act, § 504(b). *See also* Act, §§ 101, 106, 501(a); S. Rep. No. 473, 94th Cong., 1st Sess. 59 (1975).

In this case, WOR-TV is one exploiting entity; distant cable systems receiving the signal are another; EMI is a third.[14] Doubleday Sports' receipt of royalties from each of the three would be entirely consistent with the statutory scheme. In the analogous area of musical compositions under Section 106 of the Act, the rights holder receives multiple payments from the sheet-music publisher, the record company, and the radio station that plays the recording, even if all three versions of the copyrighted work reach the hands (and ears) of the same members of the consuming public. In short, the court of appeals misapprehended the basic objectives of the Copyright Revision Act.

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[14] The court of appeals suggested that unless EMI were immunized as a passive carrier, RCA, as the owner of the satellite transponder by which EMI retransmits WOR-TV, also would be required to pay a royalty (App. 17a-18a n.19). This statement betrays a fundamental misunderstanding of Section 111(a)(3). Unlike EMI, and like the telephone company, RCA is a passive carrier. It merely retransmits what its customers order, without regard to the substantive content of those retransmissions. As such, RCA qualifies for the statutory exemption.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: December 8, 1982

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CERTIFICATE OF SERVICE

In accordance with Rules 19.3 and 28.5 of the Rules of the United States Supreme Court, I hereby certify that three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit were delivered by hand to the following counsel for the appellant Eastern Microwave, Inc. in the Court of Appeals, on this 8th day of December, 1982:

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